80-1641

No. 80-1614

FILED

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ALEXANDER L.

CLERK

IN THE

Supreme Court of the United States

October Term, 1981

THE SUPREME COURT OF VIRGINIA, *et al.*,
Appellants,

v.

CONSUMERS UNION OF UNITED STATES, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM OR DISMISS

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QUESTION PRESENTED

Whether the District Court acted within its discretion in awarding attorneys fees under 42 U.S.C. Section 1988 to consumer groups who prevailed in obtaining an injunction against state enforcement officers?

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MOTION TO AFFIRM OR DISMISS

Appellees, pursuant to Rule l6, move that the judgment of the District Court be affirmed on the ground that the question raised by appellants is so insubstantial as not to warrant further proceedings. Since this Court already has sanctioned the fee award entered in this case, it should affirm that award without consideration of jurisdiction, in order to avoid unnecessary proceedings in the Fourth Circuit. Alternatively, appellees, pursuant to Rule 16, move to dismiss on the grounds that this appeal is not within this Court's jurisdiction.

STATEMENT OF CASE

In 1974, Consumers Union of United States, Inc.[1] and Virginia Citizens Consumer Council[2] (herein refered to as "Consumer Groups") sought to publish an attorney directory for Arlington County, Virginia. They were unable to gather information for the directory because of Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility ("Rule"). That Rule permitted attorneys to participate only in directories that contained very limited types of information. Because the consumer group's directory was to include additional factual information, lawyers who participated in the directory would be engaging in conduct deemed unethical by the Rule,[3] and would be subject to disciplinary action, including disbarment, by the Virginia Supreme Court.[4]

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[1]Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union Foundation, Inc. may be an affiliate under Rule 28.1.

[2]Virginia Citizens Consumer Council is a nonprofit, statewide consumer organization chartered by the State of Virginia in 1967 to educate and to promote the rights of its members. Virginia Citizens Consumer Council Fund, Inc. may be an affiliate under Rule 28.1.

[3]On January 17, 1975, the Chairman of the Legal Ethics Committee of the Virginia State Bar informed an attorney that "the Committee had unanimously ruled that listing herself in the Consumers Union directory would violate DR 2-102 (A)(6)." On June 19, 1975, the Council of the Virginia State Bar adopted this position in Legal Ethics Opinion No. 180. See *Consumers Union of U.S.* v. *American Bar Ass'n.*, 427 F. Supp. 506, 511-512 (E.D. Va. 1976).

[4]As observed by this Court, the Virginia Court has inherent and statutory authority to initiate enforcement proceedings independently of the Bar. *Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. at 721 and 724, citing. *Button* v. *Day,* 204 Va. 547, 522-555, 132 S.E. 2d 292, 295-298 (1963) and Sections 54-48 and 54-74 of the Code of Virginia (1978).

On February 27, 1975, the Consumer Groups commenced this action under 42 U.S.C. Section 1983 in the United States District Court for the Eastern District of Virginia. Their complaint sought a declaration that the Virginia Supreme Court ("Virginia Court")[5] and Virginia Bar Association ("Bar") had infringed on these rights and an injunction enjoining their enforcement of the Rule. A Three-Judge District Court was convened on April 14, 1975.

On May 8, 1979, the District Court held the entire directory to be constitutionally protected and the Rule to be unconstitutional on its face, and enjoined the Virginia Court and Bar from enforcing the Rule. The District Court determined that the Consumer Groups were entitled to reimbursement for attorney fees and costs under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988, since no special circumstances rendered such an award unjust. The Court observed that this award "would hardly be unjust" in light of the Virginia Court's "continued failure and apparent refusal to amend State Code DR2-102 (A)(6) to conform with constitutional requirements." *Consumer U. of United States* v. *American Bar Ass'n,* 470 F. Supp. 1055, 1063 (E.D. Va. 1979). The Virginia Court appealed the judgment, injunction and award of fees, claiming judicial and legislative immunity.[6]

On June 2, 1980, this Court upheld the District Court's judgment and injunction enjoining the Virginia Court from enforcing the rule after finding that neither judicial or legislative immunity apply to the Virginia Court's en-

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[5]The Virginia Supreme Court and its chief Justice, in his official capacity, are referred to herein as "Virginia Court."

[6]The Virginia Court did not appeal the award of costs other than attorneys fees.

forcement responsibilities. However, the fee award was vacated because premised on the failure of the Virginia Court to amend its Rule, a legislative act that enjoys legislative immunity. Nonetheless, the Court stated that a fee award could be entered against the Virginia Court in its direct enforcement role. *Supreme Court of Va.* v. *Consumer Union,* 446 U.S. 719, 739 (1980). On remand, the District Court awarded fees against the Virginia Court based on its direct enforcement role. *Consumers Union of United States, Inc.,* v. *American Bar Association,* No. 75-0105-R (E.D. Va. 1980) (Jurisdictional Statement at 3a).[7]

MOTION TO AFFIRM

The District Court's fee award is so plainly within its discretion that the award should be affirmed summarily. Under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. Section 1988 ("CRAFAA" or "Act", "the Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Congress emphatically directed that fee awards under CRAFAA be granted to parties who prevail, even through voluntary actions of defendants, on any matter during the course of litigation. H.R. Rep. 94-1558, 94th Cong., 2d Sess. 7 (1976); S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976). See *Maher* v. *Gagne,* 100 S. Ct. 2570, 2575 (1980) (fees awarded under CRAFAA to a party who prevailed through a settlement agreement).

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[7]On remand, the District Court held "it seems clear that in the circumstances of this case, a sufficiently concrete dispute is . . . made out against the Virginia Court as an enforcer," 48 U.S.L.W. at 4624 n.15 [446 U.S. at 736 n.15] not only for amenability to suit, but also for the purpose of a fee award to Consumers, the prevailing party." (Jurisdictional Statement at 3a.

Through this litigation the Consumer Groups obtained from the District Court the precise relief they sought, restraining all efforts by the Virginia Court to enforce the Rule. The Consumer Group prevailed against the Virginia Court in its direct enforcement role; therefore, the District Court acted well within its discretion in awarding fees against the Virginia Court in its enforcement capacity.[8] Indeed, the District Court's fee award was explicitly sanctioned by this Court in its earlier statement: "nor would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role." 447 U.S. at 749.

Since the District Court's award has already been approved by this Court, the award should be affirmed summarily, without reaching any jurisdictional questions, in order to dispose expeditiously of this litigation *Norton* v. *Mathews,* 427 U.S. 524, 531-533 (1976) (Three Judge District Court decision summarily affirmed without consideration of jurisdiction where recent Supreme Court decision rendered the issues "plainly unsubstantial"); *Secretary of The Navy* v. *Avrech,* 418 U.S. 676, 667-678 (1974); *Turner* v. *City of Memphis,* 369 U.S. 350, 353-354 (1961).

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[8]The Virginia Court's Jurisdiction Statement ignores the fact that the Consumer Groups prevailed against it in its direct enforcement role. It raises irrelevancies such as the sufficiency of the record in this case. Jurisdictional Statement at 5. Contrary to appellants' assertions, the District Court was not required to reopen the record on remand to examine the Virginia Court's enforcement role. That role is defined by the common and statutory law so that no additional factual evidence was required.

MOTION TO DISMISS

Alternatively, this appeal should be dismissed for lack of jurisdiction. The Virginia Court erroneously claims 28 U.S.C. Section 1253, as a basis for jurisdiction. This Section applies only to appeals from orders granting or denying injunctions, but not to an appeal solely from an attorney fee award. As this Court concluded in *Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719, 737 n. 16 (1980) "we would not have appellate jurisdiction under 28 U.S.C. Section 1253 to decide the attorney's fees question had it alone been appealed." Since a Three Judge Court was not required to decide the attorney fee questions, jurisdiction over an appeal from the fee award is vested solely in the United States Court of Appeals. *Turner* v. *City of Memphis,* 369 U.S. *supra* at 353.

The Virginia Court's allegation, that jurisdiction arises because the fee award contravenes this Court's mandate, is patently erroneous. This Court never ordered the District Court not to award attorneys' fees against the Virginia Court based on its enforcement role. Quite to the contrary, this Court explicitly sanctioned the fee award granted in this case. *Supreme Court of Virginia* v. *Consumers Union* 446 U.S. at 739.[9]

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[9]Since the amount of the fee award has not been determined, this award arguably is not final for appeal purposes *Liberty Mutual Insurance Co.* v. *Wetzel,* 424 U.S. 737 (1976); *Paeco, Inc.* v. *Applied Moldings, Inc.* 562 F.2d 870, 878 (3rd Cir. 1977), *but see Memphis Sheraton Corp.* v. *Kirkley,* 614 F.2d 131 (6th Cir. 1980).

Accordingly, appellees move this court to affirm summarily the fee award order of which it approved earlier or, alternatively, to dismiss this appeal for lack of jurisdiction.

Respectfully submitted,

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